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Why the Billy Mitchell Case Still Matters: Some casenote on the First Amendment, International Law, Civil Rights, and a Pioneer of Military Aviation - Douglas Waller - A Question of Loyalty: Gen. Billy Mitchell and the Court-Martial That Gripped the Nation

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WHY THE BILLY MITCHELL CASE STILL MATTERS: SOME NOTES ON THE FIRST AMENDMENT, INTERNATIONAL LAW, CIVIL RIGHTS, AND A PIONEER OF MILITARY AVIATION

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SOME CASES never die. For example, debate about the Sam Sheppard case, which was litigated for nearly half a century, continues unabated.[1] Leo Frank was convicted of the brutal murder of a thirteen-year-old girl following a tumultuous trial

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[1] Sheppard was convicted of murdering his pregnant wife in 1954. *See* State v. Sheppard, 128 N.E.2d 471 (Ohio Ct. App. 1955), *aff'd*, 135 N.E.2d 340 (Ohio 1956). In a landmark ruling, the Supreme Court later overturned the conviction on the basis of prejudicial publicity that contaminated the trial. *See* Sheppard v. Maxwell, 384 U.S. 333 (1966). Sheppard was acquitted at his second trial and died in 1970, and three decades later, his estate filed an unsuccessful suit for wrongful imprisonment. *See* Murray v. State, No. 78374, 2002 WL 337732 (Ohio Ct. App. Feb. 21, 2002), *appeal denied*, 772 N.E.2d 1202 (Ohio 2002). On the continuing debate about Sheppard's guilt, compare JACK P. DESARIO & WILLIAM D. MASON, DR. SAM SHEPPARD ON TRIAL: THE PROSECUTORS AND THE MARILYN SHEPPARD MURDER (2003), which contends that Sheppard murdered his wife, with JAMES NEFF, THE WRONG MAN: THE FINAL VERDICT ON THE DR. SAM SHEPPARD MURDER CASE (2001), which contends that Sheppard was innocent. *See generally* Patricia J. Falk, *Toward More Reliable Jury Verdicts?: Law, Technology, and Media Developments Since the Trials of Dr. Sam Sheppard*, 49 CLEV. ST. L. REV. 385 (2001); Jonathan L. Entin, *Being the Government Means (Almost) Never Having to Say You're Sorry: The Sam Sheppard Case and the Meaning of Wrongful Imprisonment*, 38 AKRON L. REV. 139 (2005).

before "a mob intent on death"[2] and was later lynched after his death sentence was commuted; that case also remains a source of controversy.[3] Similarly, the Sacco-Vanzetti case was an international *cause célèbre* during the 1920s, generating a massive body of literature, several plays, an Italian film featuring Joan Baez singing "The Ballad of Sacco and Vanzetti" and a modern re-enactment of the trial at the annual meeting of the American Bar Association.[4] Only a few years later came the Scottsboro case, which produced several landmark Supreme Court rulings, a television drama that prompted a high-profile lawsuit and a continuing body of commentary.[5] The more recent O.J. Simpson case might fit into this category, having provoked widespread debate and generated books by many participants in the events surrounding the case as well as by numerous commentators.[6]

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[2] Frank v. Mangum, 237 U.S. 309, 350 (1915) (Holmes, J., dissenting).

[3] The Georgia courts upheld Frank's conviction and denied his motions for a new trial and to set aside the verdict. *See* Frank v. State, 80 S.E. 1016 (Ga. 1914); Frank v. State, 83 S.E. 233 (Ga. 1914); Frank v. State, 83 S.E. 645 (Ga. 1914). The Supreme Court, over a powerful dissent by Justice Holmes, denied habeas corpus relief. *See* Frank v. Mangum, 237 U.S. 309. Although the Court rejected Frank's claim, his case is widely viewed as a habeas landmark because the justices unanimously agreed that mob domination could support habeas relief in some circumstances. *See, e.g.*, Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 486-87 (1963); Eric M. Freedman, *Milestones in Habeas Corpus: Part II—Leo Frank Lives: Untangling the Historical Roots of Meaningful Federal Habeas Corpus Review of State Convictions*, 51 ALA. L. REV. 1467, 1532-34 (2000); *see also* ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 86-87 (2001). On the continuing controversy about the case, see STEVE ONEY, AND THE DEAD SHALL RISE: THE MURDER OF MARY PHAGAN AND THE LYNCHING OF LEO FRANK 644-49 (2003). The Frank case inspired a vast outpouring of books, an Emmy award-winning television miniseries, and at least one novel. *See* Jonathan L. Entin, *Using Great Cases to Think About the Criminal Justice System*, 89 J. CRIM. L. & CRIMINOLOGY 1141, 1154 n.99 (1999) [hereinafter Entin, *Using Great Cases*].

[4] *See* Entin, *Using Great Cases*, *supra* note 3, at 1154 n.100.

[5] The Supreme Court first ruled on the right to counsel. *See* Powell v. Alabama, 287 U.S. 45 (1932). After the defendants were retried, the Court issued major rulings on racial discrimination in jury selection. *See* Norris v. Alabama, 294 U.S. 587 (1935); Patterson v. Alabama, 294 U.S. 600 (1935). On the litigation arising from the television drama, see Street v. Nat'l Broad. Co., 512 F. Supp. 398 (E.D. Tenn. 1977), *aff'd*, 645 F.2d 1227 (6th Cir. 1981). For representative analysis and commentary, see, for example, DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH (1969), and JAMES GOODMAN, STORIES OF SCOTTSBORO (1994).

[6] For a selected bibliography, see Entin, *Using Great Cases*, *supra* note 3, at 1141-42 nn.1-7.

Another case that cannot die is the Billy Mitchell affair.[7] The conventional story line goes as follows. The legendary leader of the American air service during World War I afterward got crosswise with the brass, whom he regarded as hidebound and myopic for ignoring his visionary ideas about the revolutionary potential of air power and his prescient warnings of a Japanese attack on Hawaii two decades before Pearl Harbor. For his effrontery he was court-martialed and forced to resign from the service, leaving the military unprepared for modern warfare and the nation vulnerable to emerging enemies. In the aftermath of September 11, the worst strikes on American territory since Pearl Harbor, renewed interest in the Mitchell story should come as no surprise. Two new books on the subject have appeared in the last three years. The latest, by journalist Douglas Waller, provides a riveting account of the court-martial as well as many new details about Mitchell's personal life offered as intermezzi during the chronicle of the legal proceedings.[8] Unlike many earlier works, Waller offers an ambivalent portrait of his protagonist as both a "visionary" and an "opportunist" before concluding that, whichever description might be more accurate, at least "[h]e had the courage of his convictions."[9]

Waller, like his predecessors, has largely ignored two fascinating legal issues. One concerns the First Amendment defense that Mitchell raised at his court-martial: that he was being prosecuted for disagreeing with his superiors. The other relates to Mitchell's ideas about the use of air power, which emphasized attacks on enemy industrial, agricultural and population centers that raised important legal and moral questions. At the same time, Waller chronicles, apparently for the first time, Mitchell's ambiguous role as both propagandist and prosecution witness in

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[7] The William Mitchell involved in this controversy should not be confused with the distinguished nineteenth century jurist who served for two decades on the Supreme Court of Minnesota and for whom a St. Paul law school is named, *see* Charles J. Reid, Jr., *The Creativity of the Common-Law Judge: The Jurisprudence of William Mitchell*, 30 WM. MITCHELL L. REV. 213 (2003), or his son, who served as Solicitor General under President Coolidge and Attorney General under President Hoover, *see William De Witt Mitchell Dead; U.S. Attorney General for Hoover*, N.Y. TIMES, Aug. 25, 1955, at 23.

[8] DOUGLAS WALLER, A QUESTION OF LOYALTY: GEN. BILLY MITCHELL AND THE COURT-MARTIAL THAT GRIPPED THE NATION (2004).

[9] *Id.* at 364. This view is considerably more positive than that of the other recent Mitchell biographer, who described Mitchell's crusade for an independent air service as "a power grab" and described the man as "not a good soldier" who "never really comprehended the development of the aircraft carrier." JAMES J. COOKE, BILLY MITCHELL 279-81 (2002).

one of the NAACP's earliest criminal cases.[10] This essay addresses each of these topics and places the Mitchell affair in the context of other celebrated conflicts involving American military leaders.

I. MITCHELL AND THE FIRST AMENDMENT

Mitchell was prosecuted under the so-called general article of the rules of conduct applicable to members of the armed services. This provision, which dates back to 1775, prohibits "all disorders and neglects to the prejudice of good order and military discipline."[11] The charges against him stemmed primarily from a lengthy and intemperate written statement that Mitchell released to the press in September 1925 in the wake of the crash of the Navy dirigible *Shenandoah* during a thunderstorm while on a goodwill tour of midwestern state fairs.[12] The statement went well beyond the *Shenandoah* tragedy to encompass a litany of other complaints about aviation policy that he had been pressing for several years in published articles, congressional testimony and internal policy deliberations.[13] He summed up his

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[10] *See* WALLER, *supra* note 8, at 343; *infra* part III.

[11] This was the language of Article 96 of the Articles of War as revised shortly before American entry into World War I, the version of the general article that was in effect at the time of Mitchell's court-martial. Act of Aug. 29, 1916, ch. 418, § 3, 39 Stat. 619, 666. This provision, with minor editorial revisions, was carried over as Article 134 of the Uniform Code of Military Justice. *See* Act of May 5, 1950, ch. 169, 64 Stat. 107, 142-43. The current version of Article 134, as trivially amended in 1956, provides:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

Act of Aug. 10, 1956, 70A Stat. 76 (codified at 10 U.S.C. § 934 (2000)).

The general article was drawn from British law dating as far back as 1642. *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 720 n.64 (2d ed. 1920). The Continental Congress adopted the first American version as Article L of the American Articles of War of 1775, *see id.* at 957, taken almost verbatim from Section XX, Article III of the British Articles of War of 1765, *see id.* at 946. Analogous provisions appeared as Section XVIII, Article 5 of the American Articles of War of 1776, *see id.* at 971, Article 99 of the American Articles of War of 1806, *see id.* at 985, and Article 62 of the American Articles of War of 1874, *see id.* at 991.

[12] *See* WALLER, *supra* note 8, at 11-20.

[13] *See id.* at 20-21. For a more detailed summary of Mitchell's statement, see BURKE DAVIS, THE BILLY MITCHELL AFFAIR 218-21 (1967).

position by saying, "These incidents are the direct result of the incompetency, criminal negligence and almost treasonable administration of the national defense by the Navy and War Departments."[14]

At the outset of the proceedings, Mitchell's civilian lawyer argued that his client had simply expressed his views about military preparedness, a right afforded to any citizen under the First Amendment.[15] The attorney did not press this argument very vigorously, in part because it tended to undermine Mitchell's desire to use the proceedings as a forum to present his views on air power to a public audience.[16] Indeed, most of the trial was devoted to the defendant's effort to prove the truth of his allegations.[17]

Entirely apart from these strategic considerations, the decision not to pursue a First Amendment defense was surely correct as a matter of legal doctrine. As of late 1925, when the court-martial took place, the Supreme Court had taken an exceedingly narrow view of freedom of speech. Barely six months earlier, in upholding New York's criminal anarchy statute, the Court observed that the judiciary should afford "great weight" to a legislative determination that certain classes of speech were too dangerous to be tolerated.[18] Of course, the general article under which Mitchell was prosecuted did not focus on speech. The Court remarked that when a general law was invoked against speech, the matter should be resolved under the clear

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[14] WALLER, *supra* note 8, at 20. Mitchell issued his statement from Fort Sam Houston, outside San Antonio, where he had been transferred after giving sharply critical testimony before a congressional committee earlier in the year. *Id.* at 7; DAVIS, *supra* note 13, at 199-207. The transfer also entailed a reduction in rank, from the temporary status of brigadier general that he enjoyed as assistant chief of the Army air service to his regular one of colonel. *See* WALLER, *supra* note 8, at 2.

[15] *See* WALLER, *supra* note 8, at 85; *see also* DAVIS, *supra* note 13, at 243-44. The lawyer, Congressman Frank Reid of Illinois, had gained Mitchell's admiration during the congressional testimony that precipitated his transfer from Washington, D.C., to Texas. *See* WALLER, *supra* note 8, at 37; DAVIS, *supra* note 13, at 199-200.

[16] *See* WALLER, *supra* note 8, at 85. Some segments of the press also treated the proceedings as a vehicle for disseminating Mitchell's views. *See* COOKE, *supra* note 9, at 194.

[17] *See* WALLER, *supra* note 8, at 168-259. The court-martial never determined whether truth constituted an absolute defense to the charges or could serve only as a mitigating factor at the penalty stage of the proceedings. *See id.* at 183-84, 215, 260-61, 315.

[18] Gitlow v. New York, 268 U.S. 652, 668 (1925).

and present danger test that had been formulated and applied in cases arising during World War I.[19]

Unfortunately for Mitchell, the Court had never upheld a free speech claim under the clear and present danger test. For example, *Schenck v. United States*,[20] the case that introduced the test, unanimously upheld a conviction for distributing anti-conscription pamphlets to persons subject to the military draft.[21] Although it is far from clear that those pamphlets posed any real danger to recruitment or to national security, more generally,[22] Justice Holmes emphasized that the First Amendment applied with less force during wartime and that the pamphlets "create[d] a clear and present danger that they [would] bring about the substantive evils that Congress has a right to prevent."[23] Moreover, a week later, the Court—without mentioning clear and present danger—unanimously upheld the conviction of the editor of a German-language newspaper for publishing antiwar articles.[24] That same day, again without invoking clear and present danger, the Court unanimously upheld the conviction of Eugene Debs for making "a bold and provocative speech" opposing American involvement in the war.[25] The opinion rebuffed the First Amendment claim in less than one sentence.[26]

Six months later, Justice Holmes, who had written all three of these opinions, took a more protective approach to speech rights. He did so, however, in a famous dissent in *Abrams v. United States*[27] that is celebrated for his thesis that "the best test of truth is the power of the thought to get itself accepted in the

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[19] *Id.* at 671.

[20] 249 U.S. 47 (1919).

[21] *Id.* at 49, 53.

[22] *See* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME—FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 214-15 (2004).

[23] *Schenck*, 249 U.S. at 52. As in *Frank v. Mangum*, the Court's opinion contained the seeds of a more expansive approach to individual rights. *See supra* note 3. *Schenck* suggested that, contrary to hints in *Patterson v. Colorado*, 205 U.S. 454, 462 (1907), the First Amendment might forbid restrictions on speech and the press other than prior restraints. *See Schenck*, 247 U.S. at 51-52. Of course, as in *Frank v. Mangum*, this suggestion did not help the claimant asserting a constitutional violation.

[24] Frohwerk v. United States, 249 U.S. 204 (1919).

[25] STONE, *supra* note 22, at 196.

[26] Debs v. United States, 249 U.S. 211, 215 (1919) (noting that one of Debs' defenses was "based upon the First Amendment to the Constitution, disposed of in *Schenck v. United States*").

[27] 250 U.S. 616 (1919).

competition of the market."[28] Although he was joined by Justice Brandeis,[29] his other seven colleagues voted to uphold the convictions of five immigrants for distributing leaflets opposing American intervention against the Russian revolution. The majority required an entire sentence to reject the First Amendment argument in that case.[30]

These cases, particularly *Schenck* and *Abrams,* are well known. Less famous are several other decisions during this period. For example, *Schaefer v. United States*[31] upheld the conviction of two officials of a German-language newspaper for publishing false reports about the war.[32] The paper's "[c]oarse" and "vulgar" statements served a "sinister purpose" and therefore enjoyed no constitutional protection.[33] *Pierce v. United States*[34] upheld the convictions of members of the Socialist Party who distributed an antiwar pamphlet called "The Price We Pay," which denounced the war as a hypocritical undertaking for the benefit of J.P. Morgan and other plutocrats rather than as a means for securing democracy abroad.[35] The Court found it to be a matter of "[c]ommon knowledge" that many of the pamphlet's statements "were grossly false."[36] *Gilbert v. Minnesota*[37] upheld the conviction of an official of the Nonpartisan League for violating a state law that proscribed efforts to obstruct recruitment to the armed services. The Court reasoned that "every word that [the defendant] uttered . . . was false, was deliberate misrepresentation of the motives which impelled [the war], and the objects for which it was prosecuted. . . . It would be a travesty on the constitutional

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[28] *Id.* at 630 (Holmes, J., dissenting).

[29] *Id.* at 631.

[30] *Id.* at 619 ("This [First Amendment] contention is sufficiently discussed and is definitely negatived in [*Schenck* and *Frohwerk*]."). For a detailed account of this case and its aftermath, see RICHARD POLENBERG, FIGHTING FAITHS: THE ABRAMS CASE, THE SUPREME COURT, AND FREE SPEECH (1987).

[31] 251 U.S. 466 (1920).

[32] The Court found insufficient evidence to sustain the convictions of two other defendants. *Id.* at 471.

[33] *Id.* at 478-79. Justices Brandeis and Holmes dissented from the affirmance of the two convictions because they found no clear and present danger to the country. *Id.* at 482-83 (Brandeis, J., joined by Holmes, J., dissenting).

[34] 252 U.S. 239 (1920).

[35] *Id.* at 245-47 (quoting extended excerpts from the pamphlet); *id.* at 256-63 (Brandeis, J., dissenting) (quoting the entire pamphlet).

[36] *Id.* at 251. Again, Justices Brandeis and Holmes dissented largely on the basis of the lack of a clear and present danger. *Id.* at 272-73 (Brandeis, J., joined by Holmes, J., dissenting).

[37] 254 U.S. 325 (1920).

privilege he invokes to assign him its protection."[38] Finally, *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*[39] upheld the revocation of second-class mailing privileges to a newspaper that had strongly criticized American involvement in the war, an administrative decision that substantially increased the paper's postage costs and effectively prevented its distribution.[40] The criticisms might have been "written more adroitly than the usual pro-German propaganda," but it was apparent that "the publisher of these articles was deliberately and persistently doing all in its power to deter its readers from supporting the war in which our government was engaged and to induce them to lend aid and comfort to its enemies."[41]

This brief account makes clear that the state of the law at the time of Mitchell's court-martial made a First Amendment defense exceedingly unpromising. To be sure, there have been significant doctrinal advances since 1925. Virtually all of these early cases have been called into doubt by *Brandenburg v. Ohio*,[42] which established a strongly protective standard for speech advocating the violation of law.[43] Moreover, *New York Times Co. v.*

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[38] *Id.* at 333. Justice Brandeis objected to the broad sweep of the law, noting that it was "in fact an act to prevent the teaching that the abolition of war is possible" and applied at all times and in all places within the state. *Id.* at 334 (Brandeis, J., dissenting). Moreover, the state law infringed the right to discuss or debate national issues. *Id.* at 343 (Brandeis, J., dissenting). Chief Justice White agreed with the latter objection, arguing that the Minnesota statute was preempted by federal law. *Id.* at 334 (White, C.J., dissenting). Justice Holmes concurred in the result without opinion, *id.*, apparently because the First Amendment had not yet been held applicable to the states. *See* STONE, *supra* note 22, at 606 n.305. The Court did that in an almost offhand passage a few months before the Mitchell court-martial. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

[39] 255 U.S. 407 (1921).

[40] *Id.* at 408-09; *id.* at 417, 419-20 (Brandeis, J., dissenting).

[41] *Id.* at 415. Again, Justices Brandeis and Holmes dissented. They did not believe that the Postmaster General had statutory authority to make the decision that deprived the newspaper of its favorable postage rate. As Brandeis explained, "adoption of the construction urged by the [government] would raise not only a grave question, but a 'succession of constitutional doubts.'" *Id.* at 429 (Brandeis, J., dissenting) (quoting Harriman v. ICC, 211 U.S. 407, 422 (1908)). Holmes wrote that "it would take very strong language to convince me that Congress ever intended to give such a practically despotic power to any one man." *Id.* at 437 (Holmes, J., dissenting).

[42] 395 U.S. 444 (1969) (per curiam).

[43] *Id.* at 447 (holding that the government may not prohibit advocacy of law violation "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

Sullivan[44] established constitutional protections for critics of government officials on the theory that "debate on public issues should be uninhibited, robust, and wide-open."[45] Moreover, *Bond v. Floyd*[46] emphasized "the right . . . to dissent from national . . . policy"[47] and the need "to give freedom of expression the breathing space it needs to survive."[48] Unfortunately for Mitchell, however, *New York Times* did not provide absolute protection for all statements about public issues,[49] and *Bond* dealt with the power of a legislature to exclude an elected member on the basis of controversial public statements.[50] Mitchell was neither the defendant in a defamation action nor an elected official, so these cases at best would have provided analogical support for a First Amendment defense at the court-martial.

A different line of cases, dealing with the speech rights of public employees, further indicates the problem Mitchell faced. *Pickering v. Board of Education*[51] articulated a balancing test for such cases. When a public employee asserts a First Amendment defense against an adverse job-related action, a court must "balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees."[52] There is no doubt that Mitchell's statements about air power and national defense addressed matters of public concern,[53] nor

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[44] 376 U.S. 254 (1964).

[45] *Id.* at 270.

[46] 385 U.S. 116 (1966).

[47] *Id.* at 132.

[48] *Id.* at 136.

[49] Instead of an absolute privilege, the Court endorsed the "actual malice" rule: a public official could recover damages for defamation by showing that the criticism had been made with knowledge of its falsity or with reckless disregard for the truth. *See N.Y. Times*, 376 U.S. at 279-80. Three justices in that case supported "an absolute, unconditional" First Amendment right to criticize public officials. *Id.* at 293 (Black, J., joined by Douglas, J., concurring); *id.* at 298 (Goldberg, J., joined by Douglas, J., concurring in the result).

[50] *See Bond*, 385 U.S. at 118.

[51] 391 U.S. 563 (1968).

[52] *Id.* at 568.

[53] *See* Connick v. Myers, 461 U.S. 138, 144-47 (1983). It might be that Mitchell's references to the working conditions under which he and other airmen labored, *see* WALLER, *supra* note 8, at 249; DAVIS, *supra* note 13, at 219, did not involve matters of public concern. *Cf. Connick*, 461 U.S. at 148 (observing that statements about working conditions that do not seek to inform the public that an agency is not properly discharging its responsibilities or that officials have breached their public trust do not involve matters of public concern). Because

was there uncertainty over what Mitchell had said.[54] After all, he had released a written statement to the press, and the statement received widespread news coverage.[55]

Nevertheless, Mitchell probably could not have prevailed under the *Pickering* test. The Supreme Court has emphasized that the time, place, manner, and context of public employee speech carry great weight in the *Pickering* test.[56] In *Pickering* itself, the Court emphasized the government's legitimate concern for preserving "discipline by immediate superiors or harmony among coworkers," as well as "close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning."[57] Senior military officers, including his immediate superiors and colleagues, were outraged by Mitchell's public statements; so was President Coolidge.[58] To make matters worse, even before those statements, the Secretary of War had characterized Mitchell's "whole course" of conduct as "so lawless, so contrary to the building up of an efficient organization, so lacking in reasonable team work, so indicative of a personal desire for publicity at the expense of everyone with whom he is associated, that his actions render him unfit for a high administrative position."[59] In short, Mitchell had burned so many bridges with his supervisors and coworkers that the efficiency prong of the *Pickering* test almost certainly would have outweighed the speech prong.[60]

Mitchell's First Amendment defense would have failed even if all of his statements dealt with matters of public concern, *see infra* notes 56-60 and accompanying text, it is unnecessary to resolve this question.

[54] *See* Waters v. Churchill, 511 U.S. 661, 677-78 (1994) (plurality opinion) (stating that a public employer may take action against an employee on the basis of what the employer reasonably believes the employee said even if the employee actually said something different).

[55] *See* WALLER, *supra* note 8, at 26. Although Waller does not mention it, Mitchell released to the press "an even more inflammatory challenge" to the brass four days after his original bombshell. DAVIS, *supra* note 13, at 223. All eight specifications in the charges against Mitchell were based on these two written statements. *See id.* at 247.

[56] Rankin v. McPherson, 483 U.S. 378, 388 (1987).

[57] *Pickering*, 391 U.S. at 570.

[58] *See* WALLER, *supra* note 8, at 25-26, 30.

[59] DAVIS, *supra* note 13, at 205.

[60] As Dean Wigmore, a harsh critic of Mitchell, put it:

> You cannot, as an honorable man, *stay inside an organization and yet be publicly damning it.* Assuming that you honestly believe these things, . . . there is only one thing for a gentleman to do: *Resign,* and then go to the public—but not till then.

Mitchell's First Amendment defense would have foundered for a more important reason. *Pickering* applies to civilian employees, but Mitchell was an Army officer. The Supreme Court upheld the general article under which he was tried half a century later in *Parker v. Levy*.[61] That case involved a military physician who publicly attacked the war in Vietnam, saying that he would refuse to go to Southeast Asia and would discourage African American troops from going because of racism at home, and that he regarded the Green Berets as war criminals.[62] The Court rejected vagueness and overbreadth challenges to the general article. In so doing, the majority emphasized that "the military is, by necessity, a specialized society separate from civilian society"[63] and that military law necessarily differs from its civilian counterpart.[64] Those differences, especially the requirements of obedience and discipline,[65] afforded wide congressional latitude to regulate the conduct of members of the armed forces and called for correspondingly greater judicial deference to the choices embodied in military rules.[66] Applying this approach, the Court found that any vagueness in the general article had been cured by authoritative military construction[67] and that Dr. Levy could not attack the provision as overbroad be-

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> More than that: Not only must a gentleman do that, but no other course could be tolerated by one's associates.

John H. Wigmore, *The Mitchell Court-Martial*, 20 ILL. L. REV. 487, 490 (1926) (emphasis in original).

Another modern line of public employment cases would not have helped Mitchell, either. Those cases deal with political patronage and generally prohibit consideration of political affiliation in hiring, promotion, transfer, and recall of government workers. *See* Rutan v. Republican Party of Ill., 497 U.S. 62 (1990); Branti v. Finkel, 445 U.S. 507 (1980); Elrod v. Burns, 427 U.S. 347 (1976). This rule applies only to low-level positions, however. The Supreme Court has excepted from First Amendment protection most confidential and policy-making jobs and other positions for which political affiliation is "an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518; *see also Rutan*, 497 U.S. at 64-65, 71 n.5; *Elrod*, 427 U.S. at 367 (plurality opinion); *id.*, 427 U.S. at 375 (Stewart, J., concurring in the judgment). Even if one could make an analogy between patronage and the charges against Mitchell, his high-level position fell within the exception identified in these cases.

[61] 417 U.S. 733 (1974).

[62] *Id.* at 735-37. For a detailed account of the case, see Robert N. Strassfeld, *The Vietnam War on Trial: The Court-Martial of Dr. Howard B. Levy*, 1994 WIS. L. REV. 839.

[63] *Levy*, 417 U.S. at 743.

[64] *See id.* at 749-51.

[65] *See id.* at 758.

[66] *See id.* at 756.

[67] *See id.* at 754-56.

cause his statements were "unprotected under the most expansive notions of the First Amendment."[68]

The Court's decision in *Levy* has received sharp criticism, including an impassioned dissent by Justice Stewart.[69] Academic commentators have also faulted the "separate society" rationale underlying the decision.[70] Nevertheless, many of these critics concede that the First Amendment might not apply as strongly in the military context as it does in civilian life. They object primarily to what they regard as excessive judicial deference in cases like *Levy*.[71] Yet one of those critics suggested that the First Amendment should not have shielded Dr. Levy because his statements undermined military discipline.[72] Not all of Mitchell's statements were as strong as those that led to Levy's court-martial, but his reference to "incompetency, criminal negligence and almost treasonable administration of the national defense" was similar in tone to Levy's war crimes charges. Moreover, unlike Levy, who was an Army captain, Mitchell was a high-ranking officer near the top of the chain of command. That fact alone might have undermined his First Amendment defense.

Indeed, modern advocates of speech rights for military personnel have also recognized the government's interest in limiting expression by high-ranking officers. Those command officers speak from positions of authority; the public, their subordinates and other nations might confuse their individual pronouncements with official policy, which in turn could

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[68] *Id.* at 761.

[69] *See id.* at 774 (Stewart, J., joined by Douglas & Brennan, JJ., dissenting) ("I find it hard to imagine criminal statutes more patently unconstitutional than these vague and uncertain articles . . . .."). Justice Stewart read his dissent from the bench, leaving onlookers with no doubt about the depth of his feelings. *See* Strassfeld, *supra* note 62, at 840 n.5.

[70] *See, e.g.*, Earl F. Martin, *Separating United States Service Members from the Bill of Rights*, 54 SYRACUSE L. REV. 599, 624-25 (2004); Diane H. Mazur, *Rehnquist's Vietnam: Constitutional Separatism and the Stealth Advance of Martial Law*, 77 IND. L.J. 701, 744-48 (2002); John F. O'Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161, 232-33, 308 (2000); *see also* C. Thomas Dienes, *When the First Amendment Is Not Preferred: The Military and Other "Special Contexts,"* 56 U. CIN. L. REV. 779, 809-13, 823-24 (1988); *see generally* Jonathan Turley, *The Military Pocket Republic*, 97 NW. U. L. REV. 1 (2002). For a more positive view of the "separate society" approach, see James M. Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C. L. REV. 177 (1984).

[71] *See, e.g.*, Dienes, *supra* note 70, at 819, 824, 825-34.

[72] *See* Mazur, *supra* note 70, at 742-43.

undermine civilian control of the armed forces and provoke diplomatic or military crises.[73] Commentators who take this position do not favor completely muzzling the brass, but none have suggested that Mitchell's court-martial violated his right to freedom of speech.[74]

In the end, Mitchell did not press his First Amendment defense because he viewed his trial in political terms, as an opportunity to make his case to the public rather than to his superiors.[75] For that reason, he did not allow his lawyer to make a closing argument but instead closed his side of the court-martial with an unsworn personal statement.[76] Had he pressed the defense, however, the outcome would have been the same, even if the case had arisen today.

II. MITCHELL, AIR POWER, AND INTERNATIONAL LAW

More troubling than the casual discussion of the First Amendment gambit, Waller presents only bits and snatches of Mitchell's strategic vision of air power, and he never explains some of the contemporaneous legal and moral concerns that gave some skeptics pause about where Mitchell sought to take American military policies. By organizing the book around the court-martial proceedings and using flashbacks to fill in earlier events, Waller misses a chance to put an important aspect of the Mitchell controversy into larger context. To be sure, the author out-

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[73] *See, e.g.*, Edward F. Sherman, *The Military Courts and Servicemen's First Amendment Rights*, 22 HASTINGS L.J. 325, 346, 350 (1971); Detlev F. Vagts, *Free Speech in the Armed Forces*, 57 COLUM. L. REV. 187, 189 (1957); Note, *Prior Restraints in the Military*, 73 COLUM. L. REV. 1089, 1116-17 (1973); *but see* Ronald N. Boyce, *Freedom of Speech and the Military*, 1968 UTAH L. REV. 240, 254-56 (criticizing these rationales for restricting military speech).

[74] In fact, these commentators recognize the benefits that can accrue from some speech by top military officers. *See, e.g.*, Vagts, *supra* note 73, at 190-91; *Prior Restraints*, *supra* note 73, at 1117; *see also* John G. Kester, *Soldiers Who Insult the President: An Uneasy Look at Article 88 of the Uniform Code of Military Justice*, 81 HARV. L. REV. 1697, 1752-53 (1968). For this reason, Professor Vagts specifically criticizes the general article as "particularly poorly adapted" to addressing the problem and as "definitely unsuitable for dealing with an area where competing policy factors require careful line-drawing." Vagts, *supra* note 73, at 213. At the same time, he does not argue that Mitchell's constitutional rights were infringed by his court-martial under the general article. *See id.* at 196-97; *see also* Kester, *supra* note 74, at 1740 n.261. Moreover, the critics of the *Levy* decision do not mention the Mitchell court-martial. *See supra* note 70.

[75] *See supra* note 16 and accompanying text.

[76] *See* WALLER, *supra* note 8, at 317-18. Mitchell had given sworn testimony during the trial and had been devastatingly cross-examined by an Army lawyer. *See id.* at 240-46, 248-52.

lines some of Mitchell's predictions about the future of warfare and is careful to include examples of where Mitchell erred as well as where he accurately foretold modern developments.[77] He also offers a brief account of Mitchell's skepticism about the role of surface vessels, but that discussion occupies only a paragraph or two of an extended account of a 1921 test in which Mitchell's aviators sank the *Ostfriesland*, a German battleship that had been regarded as invulnerable during World War I.[78] This discussion is more illuminating about the Navy's visceral opposition to Mitchell's ideas than about the ideas themselves.

Perhaps the most useful window into Mitchell's thinking is *Winged Defense*,[79] which was published less than a month after his September broadsides that led to the court-martial.[80] As might be expected of a work that the author described as a "thrown together hastily,"[81] the book has a rambling and repetitious quality. Nevertheless, *Winged Defense* offers the most comprehensive public statement of Mitchell's vision of air power.[82] It drew heavily on Mitchell's earlier magazine and newspaper articles as well as some of his congressional testimony over the previous few years, and it was published roughly contemporaneously with his trial.[83]

Mitchell argued that the rise of air power was revolutionizing warfare.[84] Unless a nation controlled the air, neither its army

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[77] *See id.* at 5-6, 56-57.

[78] *See id.* at 150; *see generally id.* at 142-55.

[79] WILLIAM MITCHELL, WINGED DEFENSE: THE DEVELOPMENT AND POSSIBILITIES OF MODERN AIR POWER—ECONOMIC AND MILITARY (1925).

[80] *See* WALLER, *supra* note 8, at 7. Mitchell hoped that the book would be a best-seller, *see id.* at 10, but sales were disappointing, *see id.* at 334.

[81] MITCHELL, *supra* note 79, at viii.

[82] Mitchell's 1923 manual on bombardment contained a more sophisticated analysis, but that was never published. Instead, he distributed it privately to members of the air service. ALFRED F. HURLEY, BILLY MITCHELL: CRUSADER FOR AIR POWER 100 (1964).

[83] *See id.* at 100.

[84] MITCHELL, *supra* note 79, at vii-viii. Mitchell was not the only advocate of this position. A number of European commentators, notably Giulio Douhet of Italy and Hugh Trenchard and B.H. Liddell Hart of Great Britain, advanced similar views. *See* HURLEY, *supra* note 82, at 76-79, 111; MICHAEL S. SHERRY, THE RISE OF AMERICAN AIR POWER: THE CREATION OF ARMAGEDDON 23-28 (1987). Mitchell met Douhet, who is regarded as the most original of the European writers, during a 1921-1922 foreign tour, but probably did not learn of the Italian's major book at that time. *See* HURLEY, *supra* note 82, at 75. That work was not translated into English until 1942, six years after Mitchell's death. *See id.* at 74-75; SHERRY, *supra*, at 371 n.1; WALLER, *supra* note 8, at 350.

nor its navy could function effectively.[85] He expressed particular skepticism about traditional naval strategy. Surface vessels would become obsolete because even the most formidable battleships could not stand up to aircraft attacks.[86] Indeed, that was the lesson of the air service's sinking of the *Ostfriesland* and other German vessels in a series of 1921 tests.[87] Submarines, on the other hand, might have a promising future, especially as devices for transporting airplanes over great sea distances.[88] Although he had less to say about the army, Mitchell took a similarly pessimistic view of its future. Traditional army functions could not survive the emergence of military aviation, he believed. An army might be able to hold and control land areas, but it would no longer fight the crucial battles.[89] Instead, decisive engagements—both offensive and defensive—would be conducted by planes.[90] To illustrate the point, he cited British reliance on aircraft in overseeing the occupation of Iraq following World War I.[91] What really mattered was the army's hidebound, backward-looking approach that rendered its current leadership "psychologically unfit" to adapt to the emerging realities of modern warfare.[92]

Mitchell couched his argument in terms of national defense. He argued that the rise of air power made the entire United States vulnerable to attack.[93] No longer would the oceans protect us from our adversaries because enemy planes could reach anywhere in the country.[94] Accordingly, America needed a strong air force to repel hostile approaches.[95] But he did not

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[85] *See* MITCHELL, *supra* note 79, at xv, 122.

[86] *See id.* at 18, 100-01, 110, 123, 133.

[87] *See id.* at 56-76. Indeed, Mitchell entitled the chapter describing those tests as "The United States Air Force Proves That Aircraft Dominate Seacraft." *Id.* at 56.

[88] *See id.* at 18, 109, 123. Mitchell predicted that Japan would transport the airplanes for its attack on Pearl Harbor by submarine; in fact, the Japanese used aircraft carriers for that purpose in 1941. WALLER, *supra* note 8, at 57.

[89] *See* MITCHELL, *supra* note 79, at 134-35.

[90] *See id.* at 122.

[91] *See id.* at 23.

[92] *See id.* at 20-21; *see also id.* at 112, 159-61.

[93] *See id.* at 11.

[94] *See id.* at xi, xiii, 11.

[95] *See id.* at 11. In fact, Mitchell contended that all countries would move toward reliance on air power. An island nation that faced a continental opponent would need to control the air approaches to its territory and strike at targets on the opponent's territory. *See id.* at 10-11. A country on the mainland facing a hostile neighbor also needed a powerful air force that could "la[y] waste" to the opponent's infrastructure. *See id.* at 11. Although Mitchell did not name specific

confine his discussion to purely defensive measures. He emphasized strategies for achieving military victory, suggesting that this country would at some point fight another overseas war.[96] To defeat an enemy, this nation would have to carry the fight to the adversary's territory, and aircraft would play a vital role in that process. Moreover, reliance on air power would deter conflict and make any future wars shorter, cheaper and more humane.[97] Facing the specter of airplane attacks, Mitchell reasoned, "a state will hesitate to go to war, or, having engaged in war, will make the contest much sharper, more decisive, and more quickly finished. This will result in a diminished loss of life and treasure and will thus be a distinct benefit to civilization."[98]

At least in theory, the new air war distinguished between military and civilian targets. A careful reading of *Winged Defense*, however, suggests that the distinction was more theoretical than real. "Air forces," Mitchell wrote early in the book, "will attack centers of production of all kinds, means of transportation, agricultural areas, ports and shipping; *not so much the people themselves.*"[99] These included "manufacturing and food centers, railways, bridges, canals and harbors."[100] Later he said, "To gain a lasting victory in war, the hostile nation's power to make war must be destroyed—this means the manufactories, the means of communication, the food products, even the farms, the fuel and oil and *the places where people live and carry on their daily lives.*"[101] These strong measures were necessary both to deprive opposing military forces of needed supplies and also to demoralize the citizenry of the opposing nation so that they would pressure their leaders to sue for peace.[102]

These passages demonstrate the elusive distinction in Mitchell's thinking between military and civilian targets. If every industrial plant, road, bridge, farm and residence is fair game for bombing, then every person in the other nation becomes a tar-

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countries, this discussion unmistakably alluded to the United Kingdom in the former category and to France as well as a potentially rearmed Germany in the latter. *See* HURLEY, *supra* note 82, at 74-75, 77; SHERRY, *supra* note 84, at 23.

96 *See* HURLEY, *supra* note 82, at 92-93.

97 *See* MITCHELL, *supra* note 79, at xvi, 14, 16, 127.

98 *Id.* at 16.

99 *Id.* (emphasis added).

100 *Id.* at xvi.

101 *Id.* at 126-27 (emphasis added).

102 *See id.* at 14, 127.

get either directly or indirectly.[103] Air war, in other words, sounds like total war. That prospect raised disturbing legal and moral questions.

The legal issues were especially vexing. Few binding rules that specifically applied to air war existed when Mitchell wrote, and those were originally written before the advent of powered flight. The Hague Peace Conference of 1899 had adopted a declaration prohibiting "the launching of projectiles and explosives from balloons, or by other new methods of similar nature."[104] By its terms, this prohibition had a duration of only five years.[105] The declaration was renewed in 1907 by the Second Hague Peace Conference.[106] The renewal was also for a limited term, to expire at the close of the projected Third Peace Conference.[107] Due to the outbreak of World War I, that conference never took place. In any event, the prohibition "generally is regarded as having no legal significance."[108] Even if it retained its vitality, this prohibition addressed a different problem than the type of aerial warfare contemplated by Mitchell. The agreement embodying the prohibition—which as its title made clear focused specifically on the use of balloons—was adopted four years before and renewed four years after the Wright brothers' initial flight at Kitty Hawk, a time when policymakers had no real inkling that motorized airplanes had military uses.[109]

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[103] The ambiguity in Mitchell's thinking about the difference between military and civilian targets is underscored by his references to attacks involving "gas," *id.* at 5, and "[c]hemical weapons of all sorts," *id.* at 165, which are even more difficult to target precisely than are bombs.

[104] Declaration to Prohibit for the Term of Five Years the Launching of Projectiles and Explosives from Balloons, and Other New Methods of a Similar Nature, July 29, 1899, 32 Stat. 1839, 1 Bevans 270.

[105] On the background to this agreement, see W. Hays Parks, *Air Law and the Law of War*, 32 A.F. L. REV. 1, 10-12 (1990).

[106] *See* Declaration Prohibiting the Discharge of Projectiles and Explosives from Balloons, Oct. 18, 1907, 36 Stat. 2439, 1 Bevans 739.

[107] *Id.* at 2439.

[108] Parks, *supra* note 105, at 17. As a practical matter, the declaration carried little weight. By its terms, it bound only the ratifying parties, and only in the event of a war involving those nations. Only the United Kingdom, which had refused to subscribe to the original 1899 ban, and the United States ratified the 1907 renewal. France, Germany, Italy, Japan, and Russia, parties to the original agreement, declined to endorse the renewal. *See id.*

[109] *See* Nathan A. Canestaro, *Legal and Policy Constraints on the Conduct of Aerial Precision Warfare*, 37 VAND. J. TRANSNAT'L L. 431, 437 (2004). Balloons had been used for military purposes on several occasions during the nineteenth century. *See* James W. Garner, *Some Questions of International Law in the European War*, 9 AM. J. INT'L L. 72, 93 (1915); Parks, *supra* note 105, at 10 n.38.

Aside from the balloon declaration, other more general rules might have provided some guidance about the legality of aerial bombing. For example, the first Hague conference of 1899 endorsed rules about land-based warfare (commonly referred to as Convention II)[110] that the second conference of 1907 revised in some particulars (commonly referred to as Convention IV).[111] Moreover, the 1907 conference also endorsed detailed regulations about naval bombardment (commonly referred to as Convention IX).[112] The land and naval rules might have extended by analogy to aerial warfare.

The relevant provisions of the land rules appeared in the Annex to Conventions II and IV. Specifically, Article 25 of Convention IV forbade "[t]he attack or bombardment, *by whatever means*, of towns, villages, dwellings, or buildings which are undefended."[113] The italicized language did not appear in Convention II, and that language might be taken to apply to aerial bombardment.[114] In addition, Article 27 of the Annex to Convention IV required that "all necessary steps" be taken "to spare" buildings and places that were "not being used at the time for military purposes."[115]

Similar restrictions appeared in the 1907 naval rules, Convention IX. For example, the very first substantive provision of those rules forbade navies from bombarding "undefended ports, towns, villages, dwellings, or buildings."[116] The next provision expanded the definition of permissible targets because it

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[110] *See* Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 1 Bevans 247 [hereinafter Convention II].

[111] *See* Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 613 [hereinafter Convention IV].

[112] *See* Convention Concerning Bombardment by Naval Forces in Time of War, Oct. 18, 1907, 36 Stat. 2351, 1 Bevans 681 [hereinafter Convention IX].

[113] Annex to Convention IV, *supra* note 111, art. 25 (emphasis added).

[114] The analogous provision of Convention II contained a couple of other minor linguistic differences from Convention IV ("habitations" instead of "dwellings" and "not defended" instead of "undefended"). Annex to Convention II, *supra* note 110, art. XXV.

[115] Annex to Convention IV, *supra* note 111, art. 27. This provision specifically mentions "buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected." *Id.* The analogous provision of Convention II contains very slight linguistic differences (providing that protective measures "should be taken" rather than "must be taken") and does not specifically mention historic monuments. *See* Annex to Convention II, *supra* note 110, art. XXVII. Both articles require that the target government indicate the protected structures or locations by "particular and visible" (Convention IV) or "distinctive and visible" (Convention II) signs.

[116] *See* Convention IX, *supra* note 112, art. 1.

defined those targets in terms of their military significance rather than their location in a defended place. According to this provision, lawful targets included not only military facilities and materiel, but also "workshops or plant[s] which could be utilized for the needs" of hostile forces.[117] In other words, civilian facilities that could benefit a nation's armed forces came within this definition. All lawful targets were fair game, but the attacking commander had to take "all the necessary measures" to protect the buildings and places covered by Article 27 of the Annex to Convention IV, "on the understanding that they are not used at the same time for military purposes."[118] The naval rules also contained a "collateral damage" provision: a commander could attack military targets after appropriate notice and warning to local authorities; a commander who complied with these requirements "incur[red] no responsibility for any *unavoidable* damage which [might have been] caused by a bombardment under such circumstances."[119]

These rules of land and naval warfare had potentially serious implications for Mitchell's grand aerial strategy. First, Mitchell's expansive definition of military targets might well have included "undefended" towns. Although the Hague Conventions did not define this crucial term (an omission that caused subsequent confusion), in practice the armed forces of many nations understood it to refer to a place that was "lacking military defenses and open to physical occupation by the enemy."[120] To the extent that Mitchell viewed an opponent's entire territory as subject to aerial attack, therefore, his strategy might entail unlawful bombing of undefended locations.

At the same time, Convention IX's expansive definition of lawful military targets, which included industrial and other facilities with potential military uses, suggested that aerial attacks could focus on the manufacturing and agricultural facilities that Mitchell envisioned. Even so, aerial attacks still would have to comply with the rules of naval bombardment embodied in Convention IX. Those rules included notice to the adversary and a reasonable time to dismantle or destroy the military targets.[121] If the adversary failed to respond appropriately within a reasonable time, then aerial bombardment could proceed provided that

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[117] *Id.* art. 2.

[118] *Id.* art. 5. For the list of protected places, see *supra* note 115.

[119] Convention IX, *supra* note 112, art. 2 (emphasis added).

[120] Parks, *supra* note 105, at 15.

[121] *See* Convention IX, *supra* note 112, art. 3.

the attack did not cause avoidable collateral damage.[122] It is not entirely clear whether Mitchell had it in mind to comply with all these requirements. At the same time, to the extent that he advocated something less than "indiscriminate bombing," his strategy might have come within the strictures of Conventions IV and IX.[123] To the extent that he contemplated attacks on residences and other civilian places—"the places where people live and carry on their daily lives"[124]—his approach would have run afoul of these provisions.

Although there might be some uncertainty about the consistency of Mitchell's approach with the 1899 and 1907 rules for land and naval warfare, it is clear that his ideas would not have comported with rules of aerial warfare that were proposed by the Hague Commission of Jurists in 1923.[125] The proposed Hague Rules of Aerial Warfare imposed stringent restrictions on air attacks. For example, Article 22 forbade such attacks "for the purpose of terrorizing the civilian population [or] of destroying or damaging private property not of military character."[126] Moreover, Article 24 strictly limited the definition of permissible targets and imposed greater responsibility for collateral damage on attackers. Lawful targets under these rules included, in addition to military personnel and facilities, "factories constituting *important and well-known centres engaged in the manufacture of arms, ammunition or distinctively military supplies*" as well as transport and communications media "used for military purposes."[127] Even when the target fell within this more stringent definition, the rules forbade an attack if the target was "so situated, that [it could not] be bombarded without the indiscriminate bombardment of the civilian population."[128]

The Hague Rules posed formidable obstacles to Mitchell's strategic vision. First, the ban on bombing for the purpose of

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[122] *See id.* art. 5.

[123] Parks, *supra* note 105, at 20.

[124] MITCHELL, *supra* note 79, at 127; *see supra* note 101 and accompanying text.

[125] For the text of these rules, see *General Report of the Commission of Jurists at The Hague*, 17 AM. J. INT'L L. 242, 245-60 (Supp. 1923) [hereinafter Hague Rules of Aerial Warfare]. The rules, together with official comments, were reprinted on the eve of World War II. *See Commission of Jurists to Consider and Report upon the Revision of the Rules of Warfare, General Report*, 32 AM. J. INT'L L. 1, 12-56 (Supp. 1938) [hereinafter *Revision of Rules of Warfare*].

[126] Hague Rules of Aerial Warfare, *supra* note 125, art. 22.

[127] *Id.* art. 24(2) (emphasis added); *Revision of Rules of Warfare, supra* note 125, art. 24(2).

[128] Hague Rules of Aerial Warfare, *supra* note 125, art. 24(3).

terrorizing civilians ran counter to his idea that aerial attacks would frighten an adversary's population into surrender.[129] Perhaps Mitchell would have opposed the idea of bombing for its own sake but contemplated, as did other strategists around the world, that an attack on a military target that incidentally crushed civilian morale was entirely appropriate.[130] These rules required that the exclusive purpose of bombing be to attack military targets.[131]

Second, the restrictive definition of permissible targets as encompassing only those known to be actually engaged in military support would have forbidden attacks on "centers of production of all kinds, means of transportation, agricultural areas, ports and shipping"[132] as well as on "the manufactories, the means of communication, the food products, even the farms, the fuel and oil."[133] Many of Mitchell's suggested targets had only military potential, which made them off limits to aerial bombardment under the Hague Rules.

Third, unlike Convention IX, these rules placed responsibility for collateral damage primarily on the attacker.[134] This meant that if an adversary placed military targets in or close to civilian areas, aerial bombardment could not proceed unless "indiscriminate bombing of the civilian population" could be avoided.[135] This difficulty was compounded by two additional factors: the Hague Rules did not define "indiscriminate bombing," and the accuracy of aerial bombing at the time left much to be desired.[136]

Whether Mitchell would have run afoul of the Hague Rules remains a purely hypothetical matter because those rules were

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[129] *See* MITCHELL, *supra* note 79, at 127; *see supra* note 101 and accompanying text.

[130] *See* Parks, *supra* note 105, at 32.

[131] *See* Hague Rules of Aerial Warfare, *supra* note 125, art. 24(2); Revision of Rules of Warfare, *supra* note 125, art. 24(2).

[132] MITCHELL, *supra* note 79, at 16; *see supra* note 99 and accompanying text.

[133] MITCHELL, *supra* note 75, at 126-27; *see supra* note 101 and accompanying text.

[134] *See* Convention IX, *supra* note 112, art. 2; *see also supra* note 119 and accompanying text.

[135] *See* Hague Rules of Aerial Warfare, *supra* note 125, art. 24(3); Revision of Rules of Warfare, *supra* note 125, art. 24(3).

[136] Although Mitchell and his supporters made much of the air service's sinking of the *Ostfriesland* and complained about the restrictive ground rules for the test, *see* WALLER, *supra* note 8, at 145-46, questions persisted about the accuracy of the bombing in light of the relative helplessness of the vessel. *See* Canestaro, *supra* note 109, at 441 n.55.

not ratified by any country.[137] On the other hand, Mitchell's approach almost certainly would have violated the most recent international rules about aerial warfare, Protocol I to the Geneva Conventions of 1949.[138] Those rules represent the first attempt since the 1923 Hague proposals to codify the law of aerial warfare.[139] The United States has not ratified Protocol I, primarily because of objections to provisions that address matters unrelated to aerial warfare, but has indicated that some of its "positive provisions" might reflect customary international law.[140] State Department officials have said that this country will follow Protocol I's provisions "to the extent that they reflect customary international law, either now or as it may develop in the future,"[141] and this country has done so in both the Persian Gulf and the Balkans.[142]

Several of Mitchell's ideas about aerial warfare were in tension with Protocol I. For example, Mitchell believed that air attacks directed at demoralizing civilians would be an effective means of defeating an enemy,[143] but Article 51 specifically prohibits actions having "the primary purpose of . . . spread[ing] terror among the civilian population."[144] Similarly, he favored attacks

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[137] *See* Parks, *supra* note 105, at 31.

[138] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, arts. 48-60, 1125 U.N.T.S. 3, 25-31, 16 I.L.M. 1391, 1412-18 [hereinafter Protocol I].

[139] *See* Canestaro, *supra* note 109, at 440; Parks, *supra* 105, at 35.

[140] Message to the Senate Transmitting a Protocol to the 1949 Geneva Conventions, 1 PUB. PAPERS 88, 89 (Jan. 29, 1987). In this statement President Reagan explained that he would not ask for Senate ratification of Protocol I because its provisions relating to wars of national liberation were "fundamentally and irreconcilably flawed." *Id.* at 88. State Department officials also cited problems with some of the provisions relating to aerial warfare but took the position that others did reflect customary international law or embodied principles that should eventually become part of customary international law. *See* Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 419, 421, 426-27 (1987); Abraham D. Sofaer, *The Position of the United States on Current Law of War Agreements*, 2 AM. U. L. J. INT'L L. & POL'Y 460, 468-69, 471 (1987). For a detailed critique of Protocol I's aerial-warfare provisions, see Parks, *supra* note 105, at 112-224.

[141] Matheson, *supra* note 140, at 420.

[142] *See* Michael P. Scharf, *The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position*, LAW & CONTEMP. PROBS., Winter 2001, at 67, 94.

[143] *See* MITCHELL, *supra* note 79, at 14, 127; *see also supra* note 102 and accompanying text.

[144] Protocol I, *supra* note 138, art. 51(2).

on "agricultural areas,"[145] "food centers,"[146] and "food products, even . . . farms,"[147] but Article 54 explicitly proscribes attacks on "objects indispensable to the survival of the civilian population, such as food-stuffs, agricultural areas for the production of food-stuffs, crops, livestock, drinking water installations and supplies . . . for the specific purpose of denying them for their sustenance value to the civilian population . . . , whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive."[148]

In addition, Mitchell advocated bombing industrial, communication and transportation facilities,[149] but that approach contravenes several provisions of Protocol I. Article 52 limits permissible targets to "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[150] Even if factories, highways, bridges, or ports might fit within this definition—and Protocol I provides that if there is any doubt about whether a facility "is being used to make an effective contribution to military action, it shall be presumed not to be so used"[151]—such attacks run the risk of killing or injuring civilians, who are protected under Article 51 "unless or for such time as they take a direct part in hostilities."[152] Faced with the prospect of civilian casualties, a bombing commander under Article 57 must "refrain from deciding to launch any attack which may be expected to cause [collateral damage] which would be excessive in relation to the concrete and direct military advantage anticipated."[153]

It is not really fair to tax Mitchell for promoting ideas that contravened controversial rules that were not drafted for another half-century after he wrote (Protocol I) or that never took formal effect (the 1923 Hague Rules), but this discussion at least suggests why some of his views might have seemed somewhat problematic. Whatever significance should attach to Protocol I

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145 MITCHELL, *supra* note 79, at 16; *see supra* note 99 and accompanying text.

146 MITCHELL, *supra* note 79, at xvi; *see supra* note 100 and accompanying text.

147 MITCHELL, *supra* note 79, at 127; *see supra* note 101 and accompanying text.

148 Protocol I, *supra* note 138, art. 54(2).

149 *See* MITCHELL, *supra* note 79, at xvi, 16, 126-27; *see also supra* notes 99-101 and accompanying text.

150 Protocol I, *supra* note 138, art. 52(2).

151 *Id.* art. 52(3).

152 *Id.* art. 51(3).

153 *Id.* art. 57(2)(a)(iii).

or the Hague Rules, the military officials who made American air policy during the 1920's took a somewhat different course than Mitchell advocated. This cannot be explained by hostility to Mitchell, because the officers responsible for the policies had worked closely with him during World War I and until his court-martial.[154] The 1925-1926 bombing text that they produced for the Air Corps Tactical School rejected the "'morale-centered' approach" endorsed by Mitchell in favor of the "industrial web theory" of bombing.[155] Although the latter strategy itself resulted in substantial civilian casualties,[156] its proponents found the alternative to be morally objectionable because it came uncomfortably close to terrorizing citizens of opposing countries and therefore blurred the sometimes obscure distinction between military and civilian targets.[157]

III. MITCHELL AND RACE

Like most of his peers, Billy Mitchell was an unabashed white supremacist. Unlike previous writers, Waller directly addresses this aspect of Mitchell's life. Mitchell revealed his racism as the youngest officer in the Army during the Spanish-American War.[158] He regarded the Cubans he encountered as little more than children,[159] referred to Filipinos in the most derogatory terms,[160] and complained bitterly about the inferiority of African-American soldiers.[161] His 1924 report on the state of American air defenses in the Pacific and potential military threats in the Far East, in which he made his famous prediction of a Japanese attack on Pearl Harbor, dripped with concern for the future of a white race imperiled by Asian peoples of color.[162]

Another notable, and heretofore unremarked, racist episode came half a dozen years after he resigned his commission follow-

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[154] *See* Lt. Col. Peter R. Faber, *The Development of US Strategic Bombing Doctrine in the Interwar Years: Moral and Legal?*, 7 U.S.A.F. ACAD. J. LEGAL STUDIES 111, 114 (1997).

[155] *Id.* at 115.

[156] *See id.* at 116.

[157] *See id.* at 115, 122.

[158] Mitchell dropped out of college to enlist as a private at the age of 18. *See* WALLER, *supra* note 8, at 70-71. Through the efforts of his father, a U.S. Senator from Wisconsin, within a week of enlisting he was commissioned as a second lieutenant. *See id.* at 71.

[159] *See id.* at 75.

[160] *See id.* at 78-79.

[161] *See id.* at 58, 78.

[162] *See id.* at 57. For details of the trip and the report, see *id.* at 54-57.

ing his court-martial conviction. Mitchell retired to his 115-acre estate in northern Virginia to raise horses and hunting dogs but continued to speak out on aviation and defense issues and hoped to secure a place in government.[163] In January 1932 a prominent society woman, with whom Mitchell was friendly, and her maid were beaten to death. Mitchell, according to Waller, was the first person to enter the house after the murders.[164] Early in 1933, a black man named George Crawford was arrested in Massachusetts and reportedly confessed to the crimes.[165] Virginia authorities sought to extradite him, but the NAACP entered the case on Crawford's behalf.[166] The organization persuaded a federal district judge in Boston to grant a writ of habeas corpus on the ground that blacks were systematically excluded from juries, a ruling that prompted outrage in Virginia. Mitchell led the call for the judge's impeachment.[167] Privately, he denounced the NAACP as subversive and opined that the Massachusetts judge should be brought to Virginia and lynched.[168]

After the United States Court of Appeals for the First Circuit overturned the district judge's order because the jury-discrimination claim could not be raised in extradition proceedings, Crawford was sent back for trial.[169] An all-black legal team headed by Charles Hamilton Houston represented him on behalf of the NAACP.[170] Mitchell testified for the prosecution during Crawford's trial for killing the society woman.[171] Houston soon developed doubts about Crawford's innocence, but he per-

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[163] *See id.* at 256, 340.

[164] *See* WALLER, *supra* note 8, at 343.

[165] *Id.*

[166] Part of the reason for the NAACP's quick intervention on behalf of Crawford was concern that the International Labor Defense, a left-wing group associated with the Communist Party that had taken control over the Scottsboro case, would take over this one as well. *See* MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950 38, 40 (1987).

[167] *See* WALLER, *supra* note 8, at 343. Nor was Mitchell alone. Southern members of Congress also sought to impeach the judge. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 127 (2004).

[168] *See* WALLER, *supra* note 8, at 343. He also reportedly remarked that Crawford would have been lynched if he had been found immediately after the murder. *See id.*

[169] *See* Hale v. Crawford, 65 F.2d 739 (1st Cir. 1933) (holding that claims of jury discrimination had to be asserted in state court after Crawford was extradited).

[170] *See* GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS 90-91 (1983); TUSHNET, *supra* note 166, at 41.

[171] *See* WALLER, *supra* note 8, at 343.

suaded the jury to spare the defendant's life after finding him guilty.[172] Rather than risk a death penalty at a second trial, Crawford pleaded guilty to killing the maid and received another life sentence.[173]

IV. MITCHELL IN HISTORICAL CONTEXT

Billy Mitchell was neither the first nor the last prominent officer to get crosswise with his superiors. During the nineteenth century, President Polk removed Army General-in-Chief Winfield Scott from the field at the height of his Mexican War success due to a long-simmering partisan conflict between a Democratic chief executive and a Whig military leader.[174] About fifteen years later, President Lincoln relieved George B. McClellan of command of the Union Army out of frustration with the general's indecisive pursuit of Confederate forces.[175] During the twentieth century, President Truman recalled General Douglas MacArthur in a highly charged policy dispute at a crucial moment of the Korean War.[176] A decade later, in 1961, President Kennedy reassigned General Edwin Walker from a divisional command in West Germany to an administrative position in Hawaii after Walker attacked the loyalty of President

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[172] *See* MCNEIL, *supra* note 170, at 94; TUSHNET, *supra* note 166, at 41.

[173] *See* MCNEIL, *supra* note 170, at 94. Waller conflates the two trials, saying that Crawford "eventually changed his plea to guilty and was sentenced to life in prison." WALLER, *supra* note 8, at 343-44.

[174] For details of Scott's removal and the background to the Polk-Scott conflict, see JOHN S.D. EISENHOWER, AGENT OF DESTINY: THE LIFE AND TIMES OF GENERAL WINFIELD SCOTT 218-19, 221-25, 235-36, 309-14 (1997); CHARLES WINSLOW ELLIOTT, WINFIELD SCOTT: THE SOLDIER AND THE MAN 424-28, 439-41, 567-75 (1937); TIMOTHY D. JOHNSON, WINFIELD SCOTT: THE QUEST FOR MILITARY GLORY 151-55, 158-60, 210-11 (1998); CHARLES A. MCCOY, POLK AND THE PRESIDENCY 128-33 (1960).

[175] *See* T. HARRY WILLIAMS, LINCOLN AND HIS GENERALS 156-78 (1952). For critical views of McClellan's generalship, see JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 358-65, 568-70 (1988); STEPHEN W. SEARS, GEORGE B. MCCLELLAN: THE YOUNG NAPOLEON 338-39 (1988). For a more sympathetic portrait, see WARREN W. HASSLER, JR., GENERAL GEORGE B. MCCLELLAN: SHIELD OF THE UNION 296-330 (1957).

[176] *See* TRUMBULL HIGGINS, KOREA AND THE FALL OF MACARTHUR 103-52 (1960); WILLIAM MANCHESTER, AMERICAN CAESAR: DOUGLAS MACARTHUR, 1880-1964 629-77 (1978); RICHARD H. ROVERE & ARTHUR M. SCHLESINGER, JR., THE GENERAL AND THE PRESIDENT AND THE FUTURE OF AMERICAN FOREIGN POLICY 96-252 (1951); DENNIS D. WAINSTOCK, TRUMAN, MACARTHUR, AND THE KOREAN WAR 121-41 (1999); STANLEY WEINTRAUB, MACARTHUR'S WAR: KOREA AND THE UNDOING OF AN AMERICAN HERO 315-56 (2000). MacArthur and Mitchell were boyhood acquaintances who had maintained contact during their military careers, and MacArthur served on the court-martial that tried Mitchell. *See* WALLER, *supra* note 8, at 49-50, 77.

Truman, Eleanor Roosevelt, and other prominent officials and tried to influence the votes of his troops.[177]

Mitchell, however, was the only high officer to be tried by court-martial as a result of his conflicts.[178] He sought vindication with the public and in politics. He went on lecture tours and wrote articles for magazines and newspapers, although his audiences and itineraries soon shrank.[179] Meanwhile, he flirted with the idea of running for U.S. Senator from Wisconsin, an office his father had held thirty years earlier, and he angled for the Democratic vice-presidential nomination in 1928, but neither of these gambits went anywhere.[180] He also campaigned for Al Smith that year and for Franklin D. Roosevelt in 1932 in hopes of securing a high-level appointment, but that dream fizzled as well.[181]

Perhaps Mitchell was thinking about Scott and McClellan when he resigned from the Army following his court-martial. Both of them failed as presidential candidates but retained much of their credibility long after their loss of command. Scott got the 1852 Whig nomination for President but was trounced by Franklin Pierce, who had served under him in Mexico.[182]

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[177] Rather than accept the reassignment, Walker resigned his commission and later testified for two days before a Senate subcommittee about the activities that got him into difficulty with the administration. WALTER LORD, THE PAST THAT WOULD NOT DIE 180-81 (1965); ARTHUR M. SCHLESINGER, JR., A THOUSAND DAYS: JOHN F. KENNEDY IN THE WHITE HOUSE 751 (1965); *Military Cold War Education and Speech Review Policies: Hearings Before the Special Preparedness Subcomm. of the Senate Comm. on Armed Services*, 87th Cong., 2d Sess. 1387-1534 (1962).

[178] General Scott was the subject of an embarrassing court of inquiry but remained on active duty. *See* EISENHOWER, *supra* note 174, at 315-20; ELLIOTT, *supra* note 174, at 575-85, 588-89; JOHNSON, *supra* note 174, at 211-12.

[179] *See* WALLER, *supra* note 8, at 333-36.

[180] *See id.* at 337-38. No one apparently questioned Mitchell's eligibility for the vice presidency, although he had been born in France to American-citizen parents who were temporarily living abroad. *See id.* at 64-65. Because he was born overseas, there might have been some question about his status as a "natural born Citizen," a constitutional requisite for eligibility for both the President and the Vice President. U.S. CONST. art. II, § 1, cl. 5; *id.* amend. XII. A minor flap arose over Michigan Governor George Romney's presidential eligibility because he had been born in Mexico to American missionary parents. *See* Charles Gordon, *Who Can Be President of the United States: The Unresolved Enigma*, 28 MD. L. REV. 1, 26-29 (1968); *see also* Anthony D'Amato, *Aspects of Deconstruction: The "Easy Case" of the Under-Aged President*, 84 NW. U. L. REV. 250, 252-53 (1989). Romney's quest for the Republican nomination failed for entirely unrelated reasons. *See* THEODORE H. WHITE, THE MAKING OF THE PRESIDENT 1968 54-61 (1969).

[181] *See* WALLER, *supra* note 8, at 338-39.

[182] *See* EISENHOWER, *supra* note 174, at 321-31; ELLIOTT, *supra* note 174, at 625-46; JOHNSON, *supra* note 174, at 213-16.

Nevertheless, he remained on active duty through the first year of Lincoln's presidency.[183] McClellan obtained the 1864 Democratic nomination but lost to Lincoln in the general election;[184] he went on to serve effectively as governor of New Jersey.[185]

Maybe General Walker's post-military fade into obscurity interrupted by a brief last hurrah comes closer to what happened to Mitchell. Walker, having joined the John Birch Society in 1959, drifted deeper into far-right politics and bitterly denounced efforts to desegregate the University of Mississippi in 1962.[186] This came as a surprise to those who remembered that he had won praise for his leadership of the federal troops President Eisenhower dispatched to Little Rock to enforce the desegregation of Central High School in 1957.[187] Walker went to the Ole Miss campus at the height of the crisis over the admission of James Meredith as the university's first African-American student; while there, Walker became the subject of a news report that he had incited and participated in violent resistance, and he wound up as the losing plaintiff in a landmark libel case that extended the *New York Times* actual-malice test to public figures.[188]

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[183] *See* EISENHOWER, *supra* note 174, at 331-98; ELLIOTT, *supra* note 174, at 647-740; JOHNSON, *supra* note 174, at 217-33.

[184] *See* SEARS, *supra* note 175, at 371-86.

[185] *See id.* at 396-97.

[186] *See* LORD, *supra* note 177, at 180, 182-83.

[187] *See* DAISY BATES, THE LONG SHADOW OF LITTLE ROCK, 101-02, 105, 127-29 (1962); *see generally* Cooper v. Aaron, 358 U.S. 1 (1958).

[188] *See* Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967). The plurality opinion in that case applies a somewhat lower standard of liability for public figures. *See id.* at 155 (suggesting that a public figure may recover damages for defamation if the substance of the statement at issue "makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers"). The other five justices endorsed the *New York Times* standard. *See id.* at 164 (Warren, C.J., concurring in the result); *id.* at 170 (Black, J., joined by Douglas, J., concurring in the result in part and dissenting in part); *id.* at 172 (Brennan, J., joined by White, J., concurring in the result in part and dissenting in part).

Walker's lawsuit arose from a wire service story that reported that he had at one point taken command of an unruly crowd and had personally led a charge against federal marshals. For the full text of that story, see Walker v. Associated Press, 191 So. 2d 727, 731-32 n.2 (La. Ct. App. 1966), *rev'd per curiam*, 389 U.S. 28 (1967); Associated Press v. Walker, 393 S.W.2d 671, 672-74 (Tex. Civ. App.—Fort Worth 1965), *rev'd sub nom.*, Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967).

For accounts of Walker's involvement in the Ole Miss crisis, see NADINE COHODAS, THE BAND PLAYED DIXIE: RACE AND THE LIBERAL CONSCIENCE AT OLE MISS 83-84, 86 (1997); LORD, *supra* note 177, at 183-84, 213-14, 215-17.

Of course, Billy Mitchell was not Edwin Walker. Walker was a political extremist obsessed by the specter of Communist subversion everywhere, whereas Mitchell had grand visions about the future of air power. He was ultimately done in by a combination of factors. First, his abrasive personal style alienated many potential supporters. Others who shared his views, some of them disciples and passionate supporters, operated more discreetly and survived to help implement many of Mitchell's suggestions.[189]

Second, he overpromised what the new technology could deliver. The problem was partly technical and partly logical. On the technical side, aerial bombardment was not sufficiently developed to serve as the primary, let alone exclusive, basis for military strategy.[190] Bombing accuracy has been a persistent problem.[191] This technical difficulty was also related to the logical problem. Logically, the argument for bombing contained an unresolved tension: proponents of aerial warfare believed that it was possible to identify crucial targets that, when neutralized or destroyed, would unravel an opposing nation's political, social, and economic structure; but the potentially catastrophic impact of bombing assumed that societies and nations were complex and interrelated networks.[192] Of course, if societies or nations are interdependent, it is difficult to pinpoint crucial targets that hold them together. On the other hand, if promising targets can be singled out, perhaps their destruction will have more discrete effects. This is not an argument against bombing, but it does suggest some inherent limitations of a strategy that relies too heavily on aerial attacks. Indeed, this logical tension might help to explain why it remains impossible for air power alone to win a war.[193]

Third, Mitchell suffered from bad timing. He argued for a whole new approach to defense policy at a time when the United States faced little immediate military threat, indeed during a period when the nation apparently was seeking a return to

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[189] *See* SHERRY, *supra* note 84, at 36; WALLER, *supra* note 8, at 359.

[190] *See* HURLEY, *supra* note 82, at 112; SHERRY, *supra* note 84, at 36, 52.

[191] *See, e.g.*, SHERRY, *supra* note 84, at 55-56, 162, 262; Canestaro, *supra* note 109, at 445-47, 451.

[192] *See* SHERRY, *supra* note 84, at 56.

[193] *See* Max Boot, *The New American Way of War*, FOREIGN AFF., July-Aug. 2003, at 41, 55.

normalcy after the Great War. Neither policy makers nor the public felt any great urgency about the situation.[194]

Finally, Mitchell faced a shrewd adversary in the frequently underestimated President Coolidge. Silent Cal was an implacable foe of unnecessary government spending, which made him reluctant to endorse potentially budget-busting projects, no matter how promising they might appear.[195] Beyond his commitment to fiscal responsibility, Coolidge had a strong conception of presidential authority and therefore took a dim view of those who went outside executive branch channels.[196] In this regard, he differed markedly from his predecessor, President Harding, who had given Mitchell and other advocates of air power a wider berth in which to operate.[197] Coolidge also had an excellent strategic sense. He wanted Mitchell out of the Army but did not want to create a martyr by having the brash aviation advocate formally dismissed from the service. The chief executive therefore took a calculated risk by setting in motion the process that led to the court-martial.[198] After the verdict, he reduced the severity of the tribunal's sanction from five years without pay and allowances to five years at half pay.[199] Even the reduced sanction led Mitchell to resign, as Coolidge suspected he would.[200] And, as Coolidge also accurately surmised, Mitchell would lose much of his luster with the public after he quit the military.[201]

The biggest lesson for lawyers in the Mitchell affair could be the tortoise-hare story of a supposedly phlegmatic chief executive outmaneuvering a charismatic and flamboyant military officer. That Coolidge managed to achieve his goal of getting rid of Mitchell without having to exercise the formal powers of his office in a visible way might have implications for the continuing debate over the president's power to remove civilian officials. For all the impassioned defenses of the unitary executive,[202] in the real world presidents have found more subtle ways than out-

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194 *See* SHERRY, *supra* note 84, at 37, 53.

195 *See* HURLEY, *supra* note 82, at 99-100; SHERRY, *supra* note 84, at 37.

196 *See* HURLEY, *supra* note 82, at 85, 91.

197 *See id.* at 85.

198 *See* WALLER, *supra* note 8, at 30-31, 41, 85.

199 *See id.* at 324, 330.

200 *See* HURLEY, *supra* note 82, at 107.

201 *See* WALLER, *supra* note 8, at 334. Although matters played out as Coolidge anticipated, the Army came to have second thoughts about the wisdom of the Mitchell court-martial. *See* Kester, *supra* note 74, at 1733 n.225.

202 *See, e.g.*, Myers v. United States, 272 U.S. 52 (1926); *see also* Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting); Steven G. Calabresi &

right dismissal to rid themselves of unwanted personnel.[203] Perhaps, therefore, the argument about removal is actually about something else.[204] That, however, is a story for another day.

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Unlike other high-profile cases such as those involving Sam Sheppard, Leo Frank, and the so-called Scottsboro boys, the Billy Mitchell case did not result in a landmark Supreme Court decision. Perhaps, for that reason, Mitchell's court-martial retains symbolic significance for the general public rather than historical significance for lawyers and legal scholars. As we have seen, however, the Mitchell affair posed some fascinating questions of constitutional and international law. Moreover, Mitchell himself played a notable and not altogether positive role in an early civil rights case that helped launch the NAACP's litigation campaign against racial discrimination. Although Waller does not address these issues in much detail, his engrossing account of Mitchell's court-martial, military career and personal life has resonance for contemporary legal and political issues.

Saikrishna B. Prakash, *The President's Power to Execute the Laws.*, 104 YALE L.J. 541 (1994).

[203] *See* Jonathan L. Entin, *The Removal Power and the Federal Deficit: Form, Substance, and Administrative Independence*, 75 KY. L.J. 699, 779-80 (1987).

[204] *See, e.g.*, Jonathan L. Entin, *Synecdoche and the Presidency: The Removal Power as Symbol*, 47 CASE W. RES. L. REV. 1595 (1997); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).


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